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IN THE
SUPREME COURT OF THE UNITED STATES

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public education system, and the private interests of employees affected by governmental action.

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at* http://www.census.gov/hhes/www/eeoindex/page_c.html?.

[3] In comparison, as of January 1, 2003, 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at* http://www.census.gov/Press-Release/www/2003/cb03-ff04se.html.

NSBA submits this brief to emphasize the significant adverse impact that affirming the Third Circuit's decision would have on the operation of our nation's public schools.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the rights of a public employee when acting not as a citizen, but as an employee, may and must be abrogated in order to balance the needs of public entities to effectively manage their internal affairs. This Court's line of First Amendment cases is very instructive, appropriately drawing the line of protection between an employee's speech as a citizen on matters of public concern and expression that is made as part of an employee's job duties or that involves a matter of private concern. This distinction is critical to the ability of public schools to make employment decisions that further their educational mission to provide students with a safe learning environment conducive to acquiring the knowledge and skills they need to become productive, responsible citizens. School district officials understand that these decisions must respect the critical balance between the rights of their employees and their interests in ensuring effective management of public schools. If the Third Circuit's reasoning with respect to the Petition Clause prevails before this Court, it will wreak havoc on this balance and override the multitude of already-existing protections held by man of our nation's 12 million school employees, protections which have been carefully crafted to achieve an appropriate balance between worker rights and an

efficient education system. It will lead to the commitment of substantial additional amounts of time and money by already-strapped school districts that need to spend their limited resources on the education of students, not additional litigation, when ample school district employee protections already exist.

ARGUMENT

I. Application of the *Connick* public concern Analysis to Employee Expression Is Essential to School Districts' Effective Management of Their Workforce To Accomplish Their Educational Mission and To Minimize Expenditure of Scarce Resources on Unnecessary Litigation.

The courts have long refused to allow public employees to transform personal disputes with employers into constitutional claims, recognizing the operational needs of the public employer. *Connick v. Meyers*, 461 U.S. 138 (1983).[4] This is especially important in the case of public schools where expression itself is implicated in the very nature of

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[4] "Although in a sense any events which transpire in a public school are matters of public concern, we have recently quoted *Connick* as stating, '"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case."' *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988) (*citing Hesse v. Board of Educ.*, 848 F.2d 748, 752 (7th Cir. 1988) (*quoting Connick*, 461 U.S. at 149)).

the employment relationship. For this reason, it is important to understand *Connick's* public concern requirement as a threshold that excludes from First Amendment protection employee speech, that is a function of official job duties[5] (i.e., instructional speech) and employee speech undertaken through an employment grievance or complaint. Neither constitutes expression on a matter of public concern. To remove this requirement because the employee speech ostensibly falls under the Petition Clause is to limit the ability of public school districts to achieve their mission.

A. Absent application of *Connick*, even under a very narrow view of protected expression under the Petition Clause, thousands of school employees would receive constitutional protection for what are essentially private employment disputes.

The refusal to apply *Connick's* public concern requirement could have the disastrous effect of raising tens of thousands of heretofore routine employment grievances filed by school employees under statewide grievance systems or pursuant to collective bargaining agreements into federal constitutional cases. The numbers boggle the mind. For instance, during the 2003-04 school year, New York City teachers filed 3,482 such grievances. Most commonly, the grievances involved class size and charges that school system administrators were

[5] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

micro-managing teacher's daily performance.[6] Significantly, the large number of grievances filed is not limited to urban centers. In 2008, teachers in West Virginia filed 592 grievances, representing about a third of all the formal employee complaints handled by the statewide public employee grievance system.[7]

Typically, school employees can bring grievances with respect to a wide variety of employment matters such as pay, hours, working conditions, health benefits, leave, promotions, vacations, insurance, discipline, seniority, layoffs, class size, re-hiring, resignation, termination, or other rights and benefits afforded by their union contracts. Because the *Connick* public concern requirement acts as a threshold beyond which public employees cannot cross without a bona fide constitutional claim, school employees who file grievances on such matters are not endowed with constitutional protection; the expression generally involves a private dispute an individual employee has with the school district.[8] While a savvy lawyer could argue that a particular issue, such as class size, is not simply a bargained term of employment,

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[6] Kathleen Lucadamo, *Teachers' Pet Peeves*, New York Daily News, 2005 WLNR 25247361 (February 21, 2005).

[7] Ry Rivard, *Teacher hiring overhaul urged*, Charleston Gazette & Daily Mail, December 8, 2009, at 1A.

[8] In *Weintraub v. Board of Educ. of City of Sch. Dist. of City of New York*, 593 F.3d 196 (2d Cir. 2010), the Second Circuit held that the filing of a grievance by a teacher about his supervisor's failure to discipline a child in his class was speech pursuant to the teacher's official job duties and therefore was not entitled to First Amendment protection. The court noted that an employee grievance is a form of discourse that has no "relevant citizen analogue." *Id.* at 203.

but rather a matter of public concern in an attempt to gain access to constitutional protections for a routine grievance, such legal contrivances are not necessary under the Third Circuit's decision; under that ruling school district employees can invoke the protection of the Petition Clause as a form of job insurance simply by filing a grievance, a normally simple process not requiring the assistance of legal counsel.

The Third Circuit's decision also explicitly extends Petition Clause protection to lawsuits filed by public employees. While exact numbers are hard to find, it is safe to say that school employees file thousands of lawsuits against their employers every year. Under the lower court's decision here, the nature of the claim asserted is irrelevant to whether the employee garners First Amendment protection by virtue of filing a lawsuit. Claims that undisputedly raise purely private concerns endow the plaintiff with a constitutional shield that can be raised to protect against future adverse action by the school district. Even claims that lack any merit whatsoever would provide this protection, thus complicating school district efforts to discipline and terminate school employees for ineffectiveness or misconduct.

Teachers, like many public employees, are often protected by state statutes[9] and collective

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[9] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http/www.ecs.org/clearinghouse/75/64/7564.doc; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to

bargaining agreements[10] that give them a right to continued employment except under narrow circumstances, making discipline and termination an already difficult process. Usually, public school teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of remediation and/or progressive discipline before being terminated. To avoid this outcome, such an employee could, under the Third Circuit's decision, try to save his or her job simply by filing a grievance and pointing to that "petition" as the underlying motivation for the proposed termination.

Even without the Third Circuit's unwarranted disposal of the public concern requirement with respect to grievances, the problem of disgruntled teachers interjecting First Amendment issues into what are primarily personal disputes already occurs all too often. For example, Brian Vukadinovich, a public school teacher, has over the last 20 years made what are essentially personal disputes with his employers into First Amendment claims.[11] His

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continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

[10] *See* Section II. A., *infra* at 20-21 for a detailed discussion of the protections afforded public school employees under collective bargaining agreements.

[11] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.), *cert. denied*, 510 U.S. 844 (1993) (finding that even if Mr.

claims have wasted a tremendous amount of resources in various district courts, the Seventh Circuit, and indeed in this Court as well. Permitting circumvention of the public concern requirement in the manner propounded by the Third Circuit in this case would simply exacerbate this problem and force courts to become "super-personnel departments," intervening unnecessarily in the operation of our nation's schools.

B. Already-stretched school district officials lack the time, resources, and expertise necessary to discern between speech and "petitions," leading to even more hesitance about disciplining employees in order to avoid the possibility of constitutional claims alleging retaliation.

As described in I.A., *supra*, public school officials face a barrage of employee complaints

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Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

addressing issues ranging from classroom conditions to discrimination to overtime pay. More importantly, the complaints come in a variety of forms. Whereas one employee may simply discuss an issue with a supervisor, another may bring an issue to the union representative, another may file a formal grievance or other written complaint,[12] another may seek redress through filing a charge with an enforcement agency, and another may file a lawsuit. Because such employee complaints, including union grievances, are such common occurrences in school districts, the application of separate analyses to employee complaints that constitute petitions—as opposed to those that constitute speech—will cripple the every-day workings of school districts.

In their roles as public employers, school officials are generally aware that employees have a First Amendment right to speak as citizens on matters of public concern, and that they may not take adverse employment action against an employee in retaliation for such speech. After *Connick* and its progeny, school officials are also aware that if the employee is speaking on a matter related to his official job duties, he is not speaking as a citizen on a matter of public concern. That sort of

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[12] School districts not only must establish grievance procedures for employees to register complaints regarding matters covered by their union contracts, but are also obligated by both federal and state laws to make available complaint procedures through which employees and students may seek redress for alleged discrimination on the basis of race, gender, religion, disability, sexual orientation, national origin, etc. School districts, both as a matter of law and policy, take steps to raise awareness of these complaint procedures and to encourage their use so that problems may be addressed at the earliest point possible.

speech—whether presented in a discussion with a supervisor or as a formalized complaint—is simply an employment dispute. Indeed, most circuits have applied the *Connick* analysis to Petition Clause cases.[13] This working knowledge has guided school officials in employment disputes for decades. However, if this Court adopts the Third Circuit's heightened standard for "petitions," at least some disputes, even of a purely private nature, will now have extra protection.

School officials already terribly stretched are ill-equipped to discern the difference between expression subject to the *Connick* public concern requirement and that which entitles the employee to First Amendment protection regardless of the context and its content. Depending on the school district, an official union grievance may be filed via hard copy in the district's office, via email, by personal delivery to the union president, or some combination. At what point is such a grievance—or any employee complaint for that matter—a "petition," so that the district must be on heightened alert not to take employment action that could be deemed in retaliation for that filing?

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[13] *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *accord Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580 (6th Cir. 2008); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*,136 F.3d 752 (11th Cir. 1998); *Tang v. Department of Elderly Affairs*, 163 F.3d 7 (1st Cir. 1998); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993); *Hoffmann v. Mayor of Liberty*, 905 F.2d 229 (8th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985).

As Petitioners clearly demonstrate, the mode of expression potentially covered by the Petition Clause under the Third Circuit's decision is neither easily determined nor neatly confined. Pet. Br. 29-34 (noting difficulties courts have in making such determinations). Having to engage in such complex legal analysis at every turn will cripple the daily workings of school districts, a consequence of the operational realities of public employers already recognized by this Court in *Connick* and its progeny. On the one hand, school officials' interactions with employees will be affected—sometimes to the point of paralysis—with school districts always second guessing themselves about disciplining employees who have filed a grievance or complained so as to avoid the possibility of being subject to a lawsuit for retaliation. On the other hand, school employees looking for job security have an incentive to formalize any complaints to ensure themselves an additional layer of legal protection.[14] For example, a teacher even mildly upset that the hours of her teacher aide have been reduced, rather than speaking to her supervisor or union representative, would be wise to file an official grievance or lawsuit to protect herself from unrelated employment actions. Courts and arbitrators who resolve grievances would be flooded with these cases.

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[14] These circumstances detract from a workplace characterized by collegiality and collaboration that schools strive to create in order to promote positive learning environments. In the case of school districts, the workplace is the classroom, a microcosm of the larger school community, in which all members have a stake. Rather than encouraging communication and opportunities for improvement, the Third Circuit's ruling pushes school districts and their employees toward more adversarial interactions.

C. Effective discipline of school employees is critical to school districts' ability to meet their accountability responsibilities for student achievement and school safety.

Not only is the potential burden of litigation tremendous, but student achievement and welfare may be compromised if the Court adopts the reasoning of the Third Circuit. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of First Amendment claims based solely upon the previous filing of a claim that constitutes a "petition."

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach...." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Given the heightened accountability standards for student performance that have been imposed in the

last few years,[15] it is especially critical that school boards retain control over the employee disciplinary process.

All public school districts in the country are answerable to taxpayers and to the federal government, who are increasingly holding them responsible for the academic performance of their students in myriad ways. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, conducting state-wide testing, setting targets for student learning, and critically, putting sanctions in place if student outcomes are not meeting expectations.[16] Performance-based accountability is also the centerpiece of the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008), which connects millions of dollars in public school federal funding to student outcomes, and severely sanctions schools and districts who fail to meet the federally-required improvement on tests.

This new era of accountability is based upon the premise that school districts and their

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[15] *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* (2008); Race to the Top initiative, American Recovery and Reinvestment Act of 2009, Public Law 11-5, as amended by Public Law 111-8, March 11, 2009, § 14006.

[16] For example, since 2006, Minnesota has had an alternative system in place for evaluating and paying public school teachers. Districts participating in the program receive an additional $260 per student in state aid and additional tax levy authority. Teachers in the program are evaluated by fellow teachers and their pay is linked to the test scores of their students. Chris Williams, *More Schools Join Minn. Teacher Reform Program*, Associated Press in Bloomberg, December 8, 2010, *available at* http://www.bloomberg.com/news/2010-12-08/more-schools-join-minn-teacher-reform-program.html.

administrators are capable of not only monitoring student performance, but of making decisive managerial decisions about resources, responsibilities and structures that are connected to performance. Nothing could be closer to student performance than teacher performance. Implementing changes in teacher responsibilities and promptly correcting and/or sanctioning teachers who are unwilling or unable to meet the heightened expectations of today's classroom is imperative. For this reason, public schools must carefully supervise employees to ensure that they create an educational environment that is safe, effective, and conducive to learning. *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F. 3d 1128, 1135 (8th Cir. 1999)("School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded . . . ."). But, that function would be severely impeded, if not entirely curtailed, were an employee able to assert that any employment decision with which he disagreed was really an act of retaliation for a previous complaint the employee had made.

In *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), this Court noted that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." As such, "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." *Id.* at 168. When the government actor is a public school district, such as one of the 15,000 school districts represented by the *Amicus* here, its interests are heightened all the more by its

responsibilities for student safety and welfare. This Court has recognized the importance of this "special characteristic of the school environment" in many constitutional contexts involving the rights of students. Public schools have a "legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (holding that school officials need not obtain a warrant before searching a student who is under their authority). "In a public school environment . . . the State is responsible for maintaining discipline, health, and safety." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830 (2002) (upholding school policy requiring students participating in extracurricular activities to submit to drug testing); *accord Morse v. Frederick*, 551 U.S. 393, 408 (2007) (holding that "the governmental interest in stopping student drug abuse . . . allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use.").

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor*, 480 U.S. at 722, *citing Connick*, 461 U.S. at 143. This

would certainly be true where school districts take action against an employee to protect student safety. Envision a teacher who has several times used inappropriate language in his class of fourth-graders. That teacher should, at some point, be disciplined or discharged if he does not stop. If the teacher has a "petition" on file, supervisors may be reluctant to act against the employee for fear it would be seen as retaliation based on the filing of the "petition," thereby leaving him in the classroom to continue the inappropriate language. If this scenario is repeated with several different teachers, the learning environment in the school could be severely compromised, leaving students exposed on a regular basis to inappropriate adult expression. What if, instead of inappropriate language, the teacher had inappropriately touched a student? In such situations supervisors must be able to act swiftly without concern about whether the employee has protected constitutional status for a previous complaint about a purely private matter. But if the Third Circuit's approach in this case is made national, school officials may in fact feel constrained to take any adverse action against an employee who has a pending "petition" on file.[17] Such a negative impact would hinder the very educational mission schools exist to carry out.

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[17] According to a news story in *L.A. Weekly*, during the 2008 school year, United Teachers Los Angles filed 650 formal grievances on behalf of teachers alleging contract violations. Roughly 300 of those grievances were filed by teachers who got negative classroom-teaching evaluations. Beth Barrett, *LAUSD's Dance of the Lemons*, L.A. Weekly, February 11, 2010, *available at* http://www.laweekly.com/content/printVersion/854792/.

D. School districts facing dire budget crises will be forced to divert scarce resources from the classroom to litigation of "petitions," many of which are not meritorious.

The cost of defending employment matters in the guise of Petition Clause claims would divert scarce public dollars from their rightful place in classrooms across America. Unlike private educational entities, public schools rely on limited governmental resources to achieve their educational mission. These resources must be carefully allocated to pay for, *inter alia*, the following: safe and adequate facilities for educating students; quality instructional materials and programs; competitive compensation to attract qualified teachers and staff; and other operating expenses necessary for maintaining quality schools. Like all employers, public school districts incur significant legal expenses defending against lawsuits that are brought by their employees and often are unable to recover such expenses even when the school district prevails. Frequently, these funds come from a school district's general revenue treasury, the category of unrestricted monies that is usually directly tied to instructional resources, including textbooks and teacher salaries.

If the Third Circuit's approach is adopted, giving employee complaints constituting "petitions" special status beyond the *Connick/Garcetti* standard, school districts necessarily will be forced to divert scarce financial resources to defend or settle those cases—which are sure to increase in number—

regardless of their merit. Reports show that school districts already spend from $45,000 to $400,000 per year on lawsuits.[18] Cumulatively, the amount of money drained away from education and into litigation is massive. Between 2006 and 2009, for example, twelve California districts spent $98.7 million on lawsuits.[19] If school districts are compelled to spend even more of their scarce resources to defend or to settle even more claims, with potential Section 1988 attorney's fees attached,[20] the financial effect could be devastating. This is particularly so in light of the current fiscal crisis school districts across the nation are experiencing with few signs of improvement in the near future. States are facing another year of significant budget gaps, after two of the most challenging years for state budgets since the Great Depression.[21] As revenues grow ever-so slowly, demands for spending increase, and funds made

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[18] D. Schimmel and M. Militello, *The Dangers of Not Knowing: Why Your Teachers Should Be Legally Literate*, for Leadership Insider, May 2009, *available at* http://www.nsba.org/MainMenu/SchoolBoardPolicies/Newsletters/Insider-May-09.aspx.

[19] California Citizens Against Lawsuit Abuse, *Lessons in Lawsuits: The Impact of Litigation on California's Schools*, (August 2010), *available at* http://www.cala.com/images/pdf/schoolsreportfinal.pdf.

[20] Nationally school districts spend approximately $200 million a year on attorneys' fees. D. Schimmel, *supra*, n. 18.

[21] *Fiscal Survey of States*, a report published by the National Governors Association and the National Association of State Budget Officers, *available at* http://www.nga.org/Files/pdf/FSS1012.PDF. *See also* NGA news release, *available at* http://www.nga.org/portal/site/nga/menuitem.6c9a8a9ebc6ac07eee28aca95010f10a0/?vgnextoid=10be80bc9c89c210VgnVCM1000005e00.

available by the American Recovery and Reinvestment Act of 2009 disappear, states will face a funding cliff in fiscal 2012[22] that will affect funding for public schools in the majority of states. The many small rural districts already struggling would be especially hard-hit.

Of course, it goes without saying that individuals whose legal rights have been violated should be able to seek redress under the existing framework of state and federal law, but as the courts have long held, those rights must be balanced with the ability of public schools to carry out their mission, particularly when the question involves the needless conversion of an employment dispute into a federal constitutional claim in a way that increases the potential for excessive and costly litigation.

II. School Employees Have Ample Protections Against Retaliation, Making Broad Petition Clause Protection Unnecessary and Potentially Disruptive.

A. Public school employees are already protected from retaliation by federal, state and local governmental entities.

Federal, state, and local governments have adopted various measures to protect employees from employers who would retaliate or otherwise take unlawful or inappropriate actions. These include federal and state whistle-blower protection laws; labor laws; and for virtually every teacher in the United States, statutory protections which provide

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[22] *Id.*

specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[23] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and conditions of employment. Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in statutes. *See* Education Commission of the States, Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm.

Typically these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures. Some of these provisions allow employees to challenge acts of alleged discrimination and retaliation. *See, e.g., City Sch. Dist., Peekskill v. Peekskill Faculty Ass'n*, 398 N.Y.S.2d 693, 695 (N.Y. App. Div. 1977) (holding that teacher's claim for retaliation based on exercise of statutorily protected rights was subject to arbitration under collective bargaining agreement, as such action would not be a

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[23] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

"just cause" dismissal); *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F. 3d 583, 587 (6th Cir. 2004)(holding that collective bargaining agreement between the teachers' union and school board created constitutional due process property interest in employment); *Glanville v. Hickory County Reorg. Sch. Dist. No. 1*, 637 S.W.2d 328, 331 (Mo. Ct. App. 1982) (holding that teacher tenure statute prohibited adverse action taken in retaliation for exercising free speech rights). Clearly, these protections serve to make an additional cause of action for alleged First Amendment violations based on the Petition Clause simply unnecessary.

In terms of substantive rights granted by statute, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions usually framed as "just cause." Typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. Procedurally, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* David M. Pedersen, "Statutory Dismissal of School Employees," Termination of School Employees: Legal Issues and Techniques §§ 10-1, 10-2 (National School Boards Association 1997). During such hearings a teacher would be able to raise the claim that the school board has no "just cause" to terminate or discipline him or her and is taking the action in retaliation for the employee's previous complaint or grievance. Moreover, all states allow teachers to appeal the school board's decisions to some entity—for example,

a state court, a tenure commission, or a state board of education. *See* Education Commission of the States, footnote 23, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

State statutes also explicitly protect school employees from retaliation for exercising their rights, including the filing of grievances, under collective bargaining statutes or agreements. Arkansas requires school districts to adopt written grievance procedures to resolve "concerns raised by an employee" and declares that "[t]here shall be no reprisals of any kind against any individual who exercises his or her rights." Ark. Code Ann. § 6-17-208 (2010). Similarly, California makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees because of their exercise of rights guaranteed" by the state's collective bargaining provisions for school employees. Cal. Gov. Code § 3543.5 (2010). Maryland law contains a similar proscription, stating that a public school employer "may not interfere with, intimidate, restrain, coerce, or discriminate against any public school employee because of the exercise of rights" under the state's teacher collective bargaining laws. Md. Educ. Code § 6-409 (2010). Ohio makes it an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee" because he has filed charges or given testimony with respect to another unfair labor practice complaint. Ohio Rev. Code § 4117.11 (2010). These statutory protections are often specifically incorporated and sometimes expanded in collective

bargaining agreements between school districts and employee organizations. Whether statutory or contractual, these rights are generally enforceable by school employees through filing charges with public employment relations boards or through the courts.[24]

In addition to the state statutory rights and remedies discussed above, the federal government has created other additional remedies. These include: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (prohibits employment discrimination based on, race, color, religion, sex, and national origin); the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (prohibits employment discrimination against qualified individuals with disabilities); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (protects individuals who are 40 years of age or older); and the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.* (protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination).

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[24] For example, the California Public Employment Relations Board has issued rulings finding violations of these provisions by school districts. *See, e.g., North Sacramento Sch. Dist.*, PERB Dec. No. 264, 7 PERC Para. 14017 (Cal. 1982) (unlawful reprimand for filing contractual grievance); *Inglewood Unified Sch. Dist.*, PERB Dec. No. 624, 11 PERC Para. 18114 (Cal. 1987) (unlawful statement that any employee who filed grievance and lost would be pressured to leave school); *Ravenswood City Sch. Dist.*, PERB Dec. No. 469, 9 PERC Para. 16040 (Cal. 1984) (unlawful threat of court action for pursuing grievance to arbitration). The New Jersey Public Employment Relations Commission (PERC) has found unlawful discrimination when employers disciplined, threatened, failed to promote, laid off and non-renewed employees because they exercised the right to file a grievance. *See, e.g., Pine Hill Bd. of Educ.*, 12 NJPER 17161 (1986); *Salem City Bd. of Educ*, 10 NJPER 15196 (1984).

Title VII, ADA and ADEA specifically prohibit retaliation against employees for opposing unlawful conduct in the workplace. The United States Equal Employment Opportunity Commission (EEOC), established by Congress, enforces all of these laws.[25] And, of course, Congress has provided private rights of action pursuant to 42 U.S.C. §§ 1981 and 1983.

This Court should not tamper with these extensive and carefully constructed measures. Given the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, no gap in legal protections to justify dragging in Petition Clause protections designed for entirely different situations. These special factors counsel against extension of the Petition Clause in the manner set forth in the Third Circuit's decision below.

B. Broad Petition Clause protection could interfere with or undermine these protections.

The multitude of already-existing protections held by our nation's 12 million school employees have been carefully crafted by federal and state legislators, school boards, and employee unions to achieve an appropriate balance between worker rights and the needs of government to carry out its educational mission. Determining the scope of these

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[25] For fiscal year 2009, the EEOC handled 93,277 complaints. Included in these complaints were 33,613 charges of retaliation. Over 52,000 of the total complaints resulted in a No Reasonable Cause finding. U.S. Equal Employment Opportunity Commission, Table, All Statutes FY 1997-FY 2009, *available at*, http://www.eeoc.gov/stats/all.html.

protections and the available remedies to enforce them has often required intense negotiations and a process of painstaking compromise before the necessary consensus is reached to permit their codification in statute or contractual agreements. Not only does the Third Circuit's decision permit circumvention of this Court's jurisprudence concerning the appropriate balance between public employee's First Amendment rights and the need for efficient operation of government in providing public services, it also could render superfluous the public policy and financial considerations that inform the judgments of legislators when they enact laws and of public employers that bind themselves to collectively bargained contracts. For example, the time and energy public school districts spend in bargaining over grievance procedures and the resources expended to establish these procedures could be rendered all for naught if the Third Circuit's view of the Petition Clause is accepted by this Court. Under that view once a school employee registers a complaint of any kind, he or she automatically has a constitutional claim in the event the employer takes any adverse action against the employee in the future. With such a cause of action in hand, the employee has a legal trump card that can override any limitations set on the types of matters that can be grieved and thereby circumvent the procedures put in place to expeditiously handle these disputes.

CONCLUSION

For the reasons stated above and those Petitioners set forth in their brief, *Amicus* urges this Court to reject the Third Circuit's unprecedented and unwise abandonment of this Court's First Amendment jurisprudence with respect to employee speech.

Respectfully submitted,

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